

VAUGHN K. LEAVITT ET AL.

IBLA 81-98, etc.

Decided May 29, 1981

Appeal from decisions of the Nevada State Office, Bureau of Land Management, rejecting applicants' desert land applications, N-22343, etc.

Reversed and remanded.

1. Applications and Entries: Generally -- Withdrawals and Reservations:
Effect of -- Withdrawals and Reservations: Revocation and
Restoration

An application for land withdrawn from appropriation under the public land laws is properly rejected and not held pending possible future availability of the land.

2. Applications and Entries: Generally -- Withdrawals and Reservations:
Effect of -- Withdrawals and Reservations: Revocation and
Restoration

An application for land filed but not adjudicated prior to restoration of the land to appropriation under the public land laws under a public land order which expressly provides that all applications filed prior to restoration shall be considered as simultaneously filed as of the date of restoration may be considered as filed as of the date of restoration.

APPEARANCES: Rulon A. Earl, Esq., Las Vegas, Nevada, for appellants.

OPINION BY ACTING ADMINISTRATIVE JUDGE GRANT

This appeal is brought by Vaughn K. Leavitt and others from decisions of the Nevada State Office, Bureau of Land Management (BLM),

rejecting their desert land entry applications on the ground that the subject land was withdrawn for the Bureau of Reclamation at the time the applications were filed. ^{1/} The decisions stated that the land did not become open to the filing of applications until a date after the applications were filed.

The case records disclose that appellants' desert land entry applications were filed with BLM on March 26 and 30, 1979. At the time the applications were filed the subject land was withdrawn by Public Land Order (PLO) No. 3501, 29 FR 16852 (Dec. 9, 1964), from all forms of appropriation under the public land laws for the proposed Moapa Valley Pumping Project pursuant to section 3 of the Reclamation Act of June 17, 1902, 43 U.S.C. § 416 (1970) (Repealed in part effective October 21, 1976, § 704(a), 90 Stat. 2792). This withdrawal of the subject lands was revoked by PLO 5664, 44 FR 34131 (June 14, 1979), effective July 13, 1979. PLO 5664 expressly provided that the land shall be open to operation of the public land laws on July 13, 1979, and that "[a]ll valid applications received at or prior to 10 a.m., on July 13, 1979, shall be considered as simultaneously filed at that time." BLM issued its decisions rejecting appellants' applications on October 2, 1980, more than a year after the close of the simultaneous filing period.

Counsel for appellants in his statement of reasons for appeal recites some of the history of desert land applications in the State of Nevada noting that on June 4, 1964, all public lands within Nevada were closed to the filing of applications for entry under the laws governing desert land applications, 43 U.S.C. §§ 321-339 (1976). Further, counsel cites the December 14, 1978, order of the Acting Assistant Secretary of the Interior which expressly rescinded the closure effective January 1, 1979, and provided that all applications filed by March 31, 1979, would be considered to have been filed simultaneously with priority to be determined by a drawing. Counsel alleges that appellants filed their applications with BLM on March 26, 1979, to take advantage of this provision.

Counsel for appellants contends that procedural due process requires that appellants' applications which were on file between June 7, 1979, and July 13, 1979, be considered to have been filed as of July 13, 1979. Counsel points out this is consistent with the language of the order revoking the withdrawal to the effect that "[a]ll valid applications received at or prior to 10 a.m., on July 13, 1979,

^{1/} The names of the applicants involved in this appeal along with the serial numbers of their applications and the docket numbers of their appeals are set forth in Appendix A attached to this decision. As there is no material distinction in the facts of these cases and the same legal issue is presented, the cases are hereby consolidated for review in this decision.

shall be considered as simultaneously filed at that time." PLO 5664, 44 FR 34131 (June 14, 1979). It is alleged that inquiry was made of BLM as to whether appellants' applications would be considered as simultaneously filed as of July 13, 1979, and that "assurance was given that the filing of a new application was not necessary." Counsel asserts that appellants have been prejudiced by the unreasonable delay in rejecting their applications in that rejection of the applications prior to July 13, 1979, would have permitted refileing with an equal opportunity to obtain priority with other applicants filing by that date. Therefore, it is asserted BLM should be precluded under the doctrine of laches from rejecting the applications because the land was withdrawn at the time they were initially filed.

The issue raised by these appeals is whether a desert land entry application is properly rejected where the subject land was withdrawn from appropriation under the public land laws at the time the application was filed but the withdrawal was subsequently revoked by public land order opening the land to operation of the public land laws after a certain date and further providing that all applications received prior to that date shall be considered as simultaneously filed where the applications remained pending during the simultaneous filing period and was not rejected until after the close of that period.

As a preliminary matter it must be noted that appellants' reliance on the Acting Assistant Secretary's order of December 14, 1978, was not reasonable as the order expressly stated that the rescission of the closure of public land in Nevada to applications for entry under the Desert Land Act, 43 U.S.C. §§ 321-324 (1976), was limited to "public lands otherwise open to petition-applications. * * * Publication of this notice does not guarantee that any public lands in Nevada are suitable or available for desert land entry." 43 FR 59555 (Dec. 21, 1978). The land at issue in this case was withdrawn and not available at the time appellants filed their applications and therefore no priority can be obtained from having filed the applications prior to March 31, 1979.

[1] As a general rule, applications which are accepted for filing must be rejected and cannot be held pending possible future availability of the land when approval of the application is prevented by withdrawal of the land or the fact that the land has not been restored to operation of the public land laws. 43 CFR 2091.1; Edith O. Fisher, 17 IBLA 258, 259 (1974). Thus, BLM might appropriately have rejected appellants' applications prior to the time that the withdrawal was revoked subject to applicants' right to make further application for the land on an equal opportunity basis with other members of the public at such time as the land might be reopened. See Ralph G. Faulkner, 26 IBLA 110 (1976), aff'd, Faulkner v. Kleppe, Civ. No. 1-77-99 (D. Idaho Nov. 16, 1979), appeal docketed, Civ. No. 176-99 (9th Cir. Jan. 10, 1980). This was not done by BLM.

[2] Applications for rights in land filed when the land is not subject to appropriation create no preference rights in the land as against subsequent applicants filing after the land is restored to operation of the public land laws. See Hunt v. State of Utah, 59 I.D. 44 (1945). Ordinarily, applications filed while the land is in a withdrawn or reserved status have no validity and will confer no rights upon the applicant, but an exception to the rule has been recognized where the order opening the land permitted the filing of applications prior to the date of the change in the status of the land. Thus, in Rachael S. Preston, 63 I.D. 40 (1956), where the order opening the land provided that the land should not be open to disposition under the public land laws until a certain date in the future but allowed the filing of applications therefore at any time after the date of the order, subject to the qualification that all applications filed prior to a specified date after the opening of the land should be considered to be filed simultaneously, it was held that the order opening the land to operation of the public land laws must be construed according to its terms to permit consideration of applications filed after the date of the order but prior to the change in status of the land.

In State of Alaska, 73 I.D. 1 (1966), aff'd sub nom. Udall v. Kalerak, 396 F.2d. 746 (9th Cir. 1968), cert. denied, 393 U.S. 1118 (1969), the rationale for the general rule that application made for land while it is withdrawn is invalid and does not become valid upon revocation of the withdrawal was set forth. Two major considerations were recited: avoidance of burdening land records with applications for land which is unavailable for the foreseeable future; and the equitable consideration of assuring the public an equal opportunity to file for the land and avoiding giving an applicant a preference to which he has no right. State of Alaska, supra at 9. The Department held that where these considerations were not thereby compromised an application for land filed while the land was withdrawn could be considered after restoration of the land. This holding was clarified in David W. Harper, 74 I.D. 141 (1967), where it was noted that the refusal to accept applications for land before it is open to disposition is primarily a matter of policy which need not absolutely preclude acceptance of applications for land filed prior to the time the land becomes available for disposition where no rights are vested in an applicant by the filing of his application other than the right to have the application considered, if no undue administrative burden is placed upon the Department in accepting such premature application, and if the application can be adjudicated in such a manner that no applicant can obtain an advantage over another applicant by virtue of premature filing. David W. Harper, supra at 149-50. In declining to apply this rationale to a mining location on withdrawn land, location of a mining claim was expressly distinguished from the ordinary application to enter under the public land laws which imposes on the Department the duty of determining whether the land can or should be disposed of under the particular law

cited in the application, whether applicant is qualified, and whether one applicant is to be preferred over another in the case of competing applications. It is only after these findings are made that any rights vest in the applicant, as opposed to the mining claimant, where rights vest independently of any Departmental action. David W. Harper, supra at 150-51.

The desert land applications which are the subject of these appeals did not constitute a burden upon the public land records as an application for land unavailable for the foreseeable future subsequent to the date of the order revoking the withdrawal and restoring the land to disposition under the public land laws. No administrative convenience is served by rejecting the applications after the land has been restored. Further, appellants are not seeking a preference right to the subject land, but rather an equal opportunity with other members of the public to file for the land. Appellants seek what the order restoring the land authorizes -- consideration of their applications, filed prior to July 13, 1979, as having been simultaneously filed prior to that date. Neither appellants nor other conflicting applicants for subject lands obtained any vested rights in the lands through the filing of applications. Therefore, it must be concluded that these cases meet the criteria for the exception to the general rule. Accordingly, the decisions of BLM must be reversed and the cases remanded to allow consideration of appellants' applications as filed before July 13, 1979, together with all other applications simultaneously filed.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are reversed and the cases are remanded.

C. Randall Grant, Jr.
Acting Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Edward W. Stuebing
Administrative Judge

Appeal Docket Number Name of Appellant BLM Serial Number

81-98	Vaughn K. Leavitt	N-22343
81-99	Kathleen Rosenhan	N-22365
81-100	Doris Earl	N-22368
81-101	Lee M. Earl	N-22369
81-102	Michael E. Leavitt	N-22370
81-103	Bernard Joseph	N-22373
81-104	Lee J. Wittwer	N-23390
81-105	Max Rosenhan	N-24117

